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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 715

ANGELO DeSTAFANO
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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No......

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Petitioner,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioner Angelo DeStafano respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 22, 1970.

The opinion of the Court of Appeals (Anderson and Feinberg, Circuit Judges, McMahon, District

Judge) is thus far unreported, and is reprinted in its entirety in an appendix hereto. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION.

The judgment and opinion of the Court of Appeals, sub nom. United States v. Angelo DeStafano, from which review is sought, was entered on July 22, 1970. An order extending time to September 20, 1970 to file petition for writ of certiorari was entered on August 21, 1970.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Is the Extortinate Credit Transactions Act unconstitutional because its prohibition against implicit threats is vague and thus void?

2. Are Sections 894 (b) and 894 (c) of said Act unconstitutional because they permit the Government to present in its case-in-chief proof of prior conduct, character and reputation in violation of due process and the right to confront witnesses?

3. Do Sections 894 (b) and 894 (c) of said Act shift the burden of proof, violate the doctrine of overbreadth and compel a defendant to forego his claim of privilege under the Fifth Amendment rendering said sections unconstitutional?

4. Is the Extortinate Credit Transactions Act unconstitutional because it concerns itself with acts which belong exclusively to the States?

5. Does Section 894 violate the Individual's Freedom to Contract?

6. Is the indictment fatally defective for failure to allege a federal jurisdictional basis?

7. Does the prosecution for violation of a statute, one of the elements of which is a loan, constitute enforcement of ex post facto legislation if the loan was extended prior to the enactment of the statute?

STATUTES INVOLVED.

§894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the

creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

STATEMENT OF THE CASE.

I. THE PROCEEDINGS.

The alleged basis for federal jurisdiction in this case, on all counts, was 18 U.S.C., Section 894, Extortionate Credit Transactions Act. A three count indictment, with two substantive counts and one conspiracy count, was returned in New Haven, Connecticut on November 19, 1968. The two named De-

fendants were petitioner DeStafano and Thomas DeBrizzi, who was a fugitive throughout the proceedings including the trial.

On November 25, 1968, a not guilty plea was entered by petitioner to all counts.

On October 16, 1969, a jury trial commenced in Bridgeport, Connecticut before United States District Judge, Robert C. Zampano.

Before the case began, petitioner moved that the indictment be dismissed and the Court reserved decision. At the conclusion of the Governments' case, the petitioner moved for judgment of acquittal, which motion was denied. A verdict of guilty was returned on all counts by the jury.

On November 17, 1969, petitioner was sentenced to three years imprisonment on each count to run concurrently. Timely notice of appeal was filed resulting in the proceedings in the Court of Appeals described above in the Statement of Jurisdiction.

II. THE FACTS.

On September 17 or 18, 1968, DeStafano went to Anthony Bove, Sr.'s place of business and had a conversation with Bove, Sr. to the effect that DeStafano wanted to know where Bove, Sr.'s son, Anthony Bove, Jr. was relating to Mr. Bove, Sr. that his son owed Thomas DeBrizzi, the fugitive co-defendant below, a sum of money. (Tr. 5, 13, 16).

Two or three days later, DeStafano and DeBrizzi

visited Bove, Sr., at which time DeBrizzi "did all the talking" (Tr. 18) and wanted to know where his son was. DeBrizzi used "a lot of bad language" and wanted his money (Tr. 18), DeStafano was present but did not speak (Tr. 18, 19).

Three or four days later, DeStafano telephoned Bove, Sr., and alerted him that DeBrizzi "was getting hot and he had to have the money" (Tr. 22) and that Bove, Sr. would have to start paying "vig." Bove, Sr. also testified that he heard and recognized Mr. DeBrizzi's voice in the background calling him names and telling him to pay up (Tr. 23-24). Bove, Sr. stated he never paid "vig" (Tr. 24) and he never borrowed money from either DeStafano or DeBrizzi (Tr. 24). The witness testified that petitioner came to his place again and told him he would have to start paying his son's debt (Tr. 23). At no time were any payments actually made.

The witness testified that the last time he saw DeStafano and DeBrizzi was "a couple of days later" at his gas station "towards the end of October." On this occasion threats were made against Bove, Sr. and he testified that "DeBrizzi was doing all the talking." According to Bove, Sr., the threats were all made by DeBrizzi, and DeStafano was merely present (Tr. 26, 27).

Bove, Sr. also testified that he bought a restaurant business for his son and when his son left town (in early September, 1968) he sold the business for his son (Tr. 30-31). He testified that DeStafano and DeBrizzi had knowledge of this fact and this was discussed at the first meeting with petitioner so that

Bove, Sr. could pay the money his son owed to DeBrizzi (Tr. 31-32). His son testified that he told Bove, Sr. to pay DeBrizzi "out of the proceeds of the sale of the business" (Tr. 92).

Anthony Bove, Jr. testified that he borrowed $3,000.00 from Thomas DeBrizzi just before he "went to Las Vegas" at the "beginning of June" (Tr. 51), but upon cross-examination he admitted that he went to Las Vegas the "beginning of June" and that he received his last loan from DeBrizzi "a week, two weeks, three weeks, five weeks" before he went to Las Vegas. Under the terms of the loan, Bove, Jr. agreed to pay Mr. DeBrizzi $3,600.00 in twelve weeks (Tr. 52). Bove, Jr. paid DeBrizzi $2,100.00 and owed him $1,500.00 (Tr. 53). He testified that he spoke to DeStafano on the telephone during the first part of September, 1968, and DeStafano made a statement to him which "meant that he wanted my father to okay the loan." He also testified that he left the Bridgeport, Connecticut area about a "day or two after Labor Day." Bove, Jr. stated he was a friend of DeBrizzi, played cards at his club and at times he would "deal the cards" at DeBrizzi's club. (Tr. 83).

The government never contended that Anthony Bove, Jr. was the victim in this case; it concedes that the only issue here is the alleged threat made to Anthony Bove, Sr. (Tr. 85, 91, 154). It is also clear that DeStafano did not extend the credit or make the loan to Anthony Bove, Jr. (Tr. 69-71, 78, 86. 86, 115).

The government offered proof by an Internal Rev-

enue Agent that the interest on the loan amounted to about 100% per annum interest (Tr. 100).

Other testimony was introduced concerning the last meeting DeBrizzi and DeStafano had with Bove, Sr. and the witnesses all testified that Mr. DeBrizzi did the talking or made the alleged threats. The sum total of the government's case against DeStafano is that DeBrizzi made an extortionate extension of credit to Bove, Sr., and DeStafano went along in the collection of this loan by extortionate means (Tr. 135, 136).

After the government's presentation, DeStafano's counsel moved for judgment of acquittal which motion was denied (Tr. 129, 138). DeStafano then rested, not offering any evidence.

DeStafano requested an instruction to the jury that an essential element of the crimes charged required a finding by the jury that the date of the extension of credit was made subsequent to May 28, 1968, the effective date of the statute, 18 U.S.C. § 894, 82 Stat. 161 (Tr. 144). The district court denied this instruction adopting the government's argument that the date of the extension of credit is not an essential element of the crimes charged (Tr. 146).

REASONS FOR GRANTING THE WRIT.

I. **The Extortionate Credit Transactions Act is unconstitutional because its prohibition against implicit threats is void for vagueness.**

Section 891 (7) defines "extortionate means" as:

> ". . . any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation or property of any person."

Thus the statute prohibits —

(1) the actual use of violence; and

(2) the express threat of use of violence; and/or

(3) the implicit threat of use of violence.

To prove the "implict threat", the statute provides novel rules of proof which raise serious constitutional questions.

A. Section 894's Prohibition Against "Implicit Threats" is Void for Vagueness

The statute clearly proscribes implicit threats. Any manifestation verbal or otherwise, would be classified as an express threat. In order to have an implied threat there would be no outward or objective manifestations. An implied threat would thus be entirely innocent.

The statute is vague because superficially innocent acts cannot be distinguished from entirely innocent acts.

The statute does not provide a definition or rule of construction for interpreting the phrase "implicit threat." Section 894(b) and (c) provide two alter-

native types of evidence which may be used to prove the existence of an implicit threat, but they do not set out **the elements of the crime.** If the threat is in no way "express", then it must be totally subjective to the parties or perhaps even to the borrower alone. This statutory vagueness subjects any creditor to uncertainty about the legality of his acts — for it may be a crime if the debtor mistakenly believes that a threat is being made when the creditor intends no such thing.

The criminal law must make differentiations between the innocent and the guilty, and it must define acts which it calls "criminal" with sufficient clarity that a reasonable man will understand when he has transgressed the law. It is well established that a statute which is so vague and standardless as to leave the public uncertain as to the conduct it prohibits violates the constitutional standard of due process. **E.g., Giaccio v. Pennsylvania,** 382 U.S. 399 (1966); **Bagget v. Bullitt,** 377 U.S. 360 (1964); **Lanzetta v. New Jersey,** 306 U.S. 451 (1939). A statute which threatens to deprive an individual of his liberty must inform him with appropriate definiteness of the nature of his offense, for "no man. . . shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." **United States v. Harriss,** 347 U.S. 612 (1947).

On the face of the statute, then, an innocent attempt to collect a debt may qualify as an "implicit threat" which qualifies as "extortionate means" under section 894. There is nothing in the statute which says what other facts are necessary to turn an innocent act into an implicit threat. The statute forbids

no specific or definite act but opens the door to "the widest possible inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." **United States v. L. Cohen Grocery Co.**, 255 U.S. 81, 89 (1921).

A statute which makes criminal an innocent act is too vague to withstand the constitutional tests of the Due Process Clause. As the Supreme Court said in **Connally v. General Construction Co.**, 269 U.S. 385, 393 (1926):

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime **and the elements** constituting it, must be **so clearly expressed that the ordinary person can intelligently choose in advance what course is lawful for him to pursue.** Penal statutes prohibiting a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." (Emphasis added).

II. Sections 894 (b) and 894 (c) of said Acts are unconstitutional because they permit the Government to present in its Case In Chief Proof of Prior Conduct, Character and Reputation In Violation of Due Process and the Right To Confront Witnesses.

Sections 894(b) and (c) set forth the evidence which apparently is intended to be sufficient to sustain a conviction. In so doing they run afoul of the Constitution.

Section 894(b) provides that evidence of the debtor's knowledge that "one or more extensions of credit by the creditor were collected or attempted to be collected by extortionate means may be introduced." The prior extortionate means — which again includes implicit threats — must (1) have been known to the debtor at the time the alleged threat was made, and (2) relate only to other extensions of credit by the creditor which he collected or attempted to collect by extortionate means.

And section 894(c) provides for admission into evidence of defendant's reputation in the community.

Both of these sections violate the general rule which prohibits the introduction of character evidence by the prosecution in a criminal trial. **Michelson v. United States,** 335 U.S. 469 (1948), presents a very explicit statement of this rule:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, . . . **but it simply closes the whole matter of character, disposition and reputation on the prosecutor's case-in-chief. The state may not**

> **show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors,** even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and so to overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." **Michelson v. United States, supra,** 335 U.S. at 476-477. (Emphasis added).

The prior extortionate acts made admissible under section 894(b) are intended to show the **quality of a defendant's character** — his **propensity** to commit acts of violence in order to collect loans. It is the uncontroverted rule, as noted that evidence of prior acts or of bad character may **not** be introduced by the prosecution when they are only relevant to show propensity, or tendency to commit the same sort of acts.

And the reputation evidence permitted under section 894(c) — which is again relevant by virtue of the subjective allegation of implicit threats — also violates the Sixth Amendment.

The Sixth Amendment to the Constitution of the United States guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him." The right to confrontation is granted in order to secure the indispensable right to cross-examination. **Dowdell v. United States,** 221 U.S. 325 (1911); **United**

States v. Johnson, 129 F. 2d 954 (3 Cir. 1941; **Curtis v. Rives,** 123 F. 2d 936 (D. C. Cir. 1941).

The right to cross-examination is violated by the admission at trial of any hearsay evidence. It is unquestionable that the use of reputation evidence which is sanctioned by section 894(c) is hearsay. It is a testimonial report of out-of-court statements which are used to prove the truth of the assertions. The **truth** is a requisite to the elements of the offense — that any attempt by the creditor to collect his extensions of credit will involve a threat of violence.

Section 894(d) permits evidence of prior acts without reference to judicial discretion. To be sure, prior acts evidence is traditionally admissible in some circumstances, under proper judicial balancing. McCormick, **Evidence** § 157 (1954). A rule which allows the admission of prior criminal activities as evidence in all cases, with no regard for the factual circumstances or the balancing of prejudicial effect, abolishes the concept of judical discretion. It also leads to admission of evidence when it was not relevant to any specific element of the crime at trial, thereby introducing prejudice and uncertainty.

Section 894(c), on the other hand, calls for the exercise of judical discretion in using reputation evidence. But this cannot salvage the constitutionality of section 894(c). The discretion of the trial judge is important when, as discussed above, there are certain exceptions to exclusionary rules which a judge must evaluate. In no case may reputation evidence be introduced **initially** by the prosecutor in a criminal trial. None of the exceptions which permit

similar acts to be introduced by the prosecution apply to reputation evidence.

The provision for the trial judge's discretion and for the proof of one or two of the conditions precedent mentioned in section 894(c) are irrelevant to the constitutionality of this section. Such evidence would be inadmissible and prejudicial under any circumstances.

III. The Proof of Prior Acts Permissible Under Sections 894(b) and 894(c) Shifts the Burden of Proof, Violates the Doctrine of Overbreadth and Compels a Defendant to Forego his Privilege Against Self-Incrimination.

As noted, § 894(b) and § 894(c) — relevant now because of the nature of the charge relating to implict threats — lessen the government's burden. Under these sections it need not even prove an actual threat but can allege an implicit threat and rely on past acts and reputation to meet its burden.

This is merely an attempt to "solmenize the silence of the accused into evidence against him", **Griffin v. California,** 380 U.S. 609, 614 (1965), or compel him to testify. This, the Fifth Amendment forbids.

Moreover, prior acts and reputation operate so as to shift the burden of proof. "The presumption of innocence is permanently shattered." **Stump v. Bennett,** 398 F. 2d 111, 116 (8 Cir. 1968). A defendant must come forward with evidence to negate his prior conduct and his reputation.

And by proscribing conduct as criminal on the basis of prior acts and reputation, the sections are overboard in that they impose sanctions for present innocence on past guilt or community view of guilt.

IV. The Statute Constitutes an Unlawful Delegation of Congressional Power to the States.

Defendant contends the Extortionate Credit Transactions Act violates the fundamental constitutional principle that the function of enacting federal legislation is reserved to the Congress.

> "While Congress cannot delegate to private corporations or anyone else the power to enact laws, it may employ them in an administrative capacity to carry them into effect. **Berman v. Parker,** 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). 'The true distinction * * * is between the delegation of the power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' " **Crain v. First National Bank of Oregon, Portland,** 324 F. 2d 532, 537 (9 Cir. 1963).

As noted, an express or implicit threat, an essential element of the offense under section 894, may be proved under section 894(c) by evidence of defendant's reputation. Such damaging evidence may be utilized if (18 U.S.C. § 892(b)(1)):

> "The repayment of the extension of credit, or

> the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor
>
> "(A) in the jurisdiction within which the debtor, if a natural person, resided or
>
> "(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made."

In other words, the fact that the debt, an essential element of the crime, was legally unenforceable in the particular state where the debtor is located is made a basic condition for allowing proof of extortionate means under section 894(c). The several states are therefore given the power to make conduct, which might otherwise be innocent, a federal crime.

The Supreme Court held in **A.L.A. Schechter Poultry Corp. v. United States,** 295 U.S. 495 (1935), that the determination of what constitutes "fair competition" may not be left to the President:

> "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever law he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." 295 U.S. at 537.

If the code-making authority of the President to regulate fair competition was held to be an unconstitutional delegation of federal legislative power, abdication to the several states of the power to enact

standards respecting the reputation of defendants charged with federal offenses would seem even more improper. Moreover, by delegating to the states the power to determine essential elements of federal crimes, the present statute violates the supremacy clause of the Constitution.

Decisions of the Supreme Court, such as **United States v. Sharpnack,** 355 U.S. 286 (1958), upholding the Assimilative Crimes Act of 1948, which deal with federal enclaves, are not controlling on this issue. Where Congress is dealing with federal property, such as federal enclaves, its law making power is plenary. Congress makes all the rules and has power to enact the entire criminal law, including offenses ordinarily reserved to the states since they lack the requisite federal element for federal crimes in force throughout the nation. In cases like **Sharpnack,** then, Congress has the power under its plenary jurisdiction over federal enclaves to assimilate the law of the state in which the enclave is situated without improper delegation. But, in the instant case, where the statute purports to be based on federal jurisdiction applicable to all the states, the delegation to the states of the power to make certain conduct a federal offense is unconstitutional.

V. Section 894 Violates An Individual's Freedom of Contract.

The Fifth Amendment protects the individual's right to freedom of contract. **Addyston Pipe & Steel Co. v. United States,** 175 U.S. 211, 228 (1899). The right to contract, not absolute, is subject to govern-

mental regulation. But the Court must ask "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." **Home Building and Loan Ass'n v. Blaisdell,** 290 U.S. 398, 438 (1934).

Section 894 is an arbitrary and unreasonable restriction on the constitutionally guaranteed liberty to contract. Because of section 894(b) and (c), a creditor who (1) has ever used violence to collect a loan, or (2) has a reputation for using or threatening violence to collect loans may never attempt to collect another loan in his life without fear of prosecution for making an "implicit threat" of violence. His past indelibly taints all future loan-making activity and prosecution under section 894 is so imminent, that he is effectively restrained from making any contracts of loans.

This restraint upon freedom of contract is arbitrary and unreasonable for reasons of logic, and it is also contrary to existing law.

First, it is **no more reasonable,** to infer from the fact that a man has done an act once that he will do it again, than it is to infer that he will **not** do it again. The forces and varieties of human activity are too numerous to make one inference any more likely than the other. See, 2 Wigmore, **Evidence** 192 (3d ed. 194). Therefore, by logic, it is **arbitrary** for the statute to presume, as it does, that an attempt by a creditor to collect a loan carries a threat of violence if in the past he has actually collected a loan with violence. It it even more arbitrary for the stat-

ute to presume that his attempt to collect a loan carries a threat of violence because he has a **reputation** for collecting loans with violence. These arbitrary presumptions subject individuals to prosecution for innocent attempts to collect their loans and in so doing, arbitrarily and unreasonably restrain these individuals from making the loans, **i.e.,** from freely contracting to do so.

The presumption of guilt which section 894(b) and (c) place on certain individuals is not only arbitrary, it is illegal under current law. Such a presumption has already been struck down.

To this effect is the holding in **International Shoe Machinery Corp. v. United Shoe Machine Corp.,** 315 F. 2d 449, 459-460 (1st Cir. 1963), that the plaintiff could not introduce a government judgment of violations in 1938-51 to prove violations in 1952-56:

> "If [the state] . . . does not have, . . . independent evidence [of a violation at the time charged in the complaint], we do not believe that [it] should be able to use the prior judgment as a crutch in the attempt to supply the essential elements of [its] action."

Prosecution under section 894 uses just such a crutch to supply essential elements of the crime of making an implicit threat. For fear of prosecution, individuals are constrained from making and collecting loans. A statute which constrains constitutionally protected activity on the basis of an arbitrary and illegal presumption is itself unreasonable and is an invalid attempt to regulate such activity.

Section 894 subjects to criminal sanction any attempt to enforce a contract of debt, regardless of the subject matter, on the arbitrary and illegal presumption that it was **not freely made** if the creditor ever used extortionate means or had a reputation for doing so. Such a restriction of the creditor's freedom to contract is arbitrary and illegal, and therefore unconstitutional.

VI. The Extortionate Credit Transactions Act Is Fatally Defective For Failure To State A Basis Of Federal Criminal Jurisdiction.

In enacting legislation against extortionate credit transactions, as part of the Consumer Credit Protection Act of 1968, Congress proscribed the specific conduct noted in 18 U.S.C. §§ 892, 894. Significantly, it did not provide that the proscribed extortionate credit transactions or related collections need affect interstate or foreign commerce or impair the effectiveness of the federal laws on bankruptcy.

Instead, the Congress declared as policy in Section 201 of P. L. 90-321 (1968), that:

> "(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of title 18 of the United States Code [this chapter] are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy."

Although, Congress may constitutionally regulate

both interstate and foreign commerce and bankruptcy, by means of criminal laws, the extortionate loan statute, as noted, does not require any specific allegation or finding that the loan in question, or the collection of the loan, interferes with commerce or with bankruptcy proceedings. A statute which does not require proof of any jurisdictional facts could be applied to activities over which the Congress in fact has no jurisdiction.

Therefore, the statute is unconstitutional in that it regulates conduct solely within the province of the states.

A. The Statute is Unconstitutional in that it Sweeps Within its Reach Acts which Belong Solely Within the Province of State Regulation and which the Federal Government has no Power to Regulate in Contravention of the Doctrine of Overbreadth and the Tenth Amendment.

The powers of the federal courts are strictly limited, based upon grants of power from Congress, as authorized by the Constitution of the United States. As the Supreme Court has stated:

> "The powers of the general government are made up of concessions from the several states; whatever is not expressly given to the former, the latter expressly reserve . . . . All other (than the Supreme Court) courts created by the general government possess no jurisdiction but what is given them by the power that creates them, **and can be vested with none but what the**

> **power ceded to the general government will authorize them to confer." United States v. Hudson & Goodwin,** 7 Cranch 32 (1818). (Emphasis added.)

The scope of criminal activity over which the federal courts have jurisdiction is also thus limited. It is well established that there are no common law offenses against the United States. **United States v. Hudson & Goodwin,** 7 Cranch 32 (1818); **United States v. Eaton,** 144 U.S. 677 (1892); **United States v. George,** 228 U.S. 14 (1913); Wright, **Federal Courts** § 21 (1963).

A brief survey and discussion of federal criminal regulation demonstrates that the allegation of a federal basis for intervention has, from the beginning, been a necessary constituent element of federal criminal statutes. The types of regulated activity fall into general categories:

> "All crimes cognizable in federal courts become so by reason of enactments made in assertion of the powers assigned exclusively to the general government, and federal criminal law is concerned with the accumulation of these enactments. Division may be made into three general categories. First are those crimes that imply defiance of, or interference with, an express power of Congress; second, those that involve misuse of facilities provided or regulated by Congress in the application of its powers; and third, those that become federal crimes because committed on territory over which the federal government has jurisdiction, either by reason of its sov-

> ereignty or by cession for its governmental purposes." Conboy, **Federal Criminal Law** in **Law: A Century of Progress** 299 (1937).

The Congress only gradually drew on its powers to enact criminal statutes:

> "The first federal criminal legislation antedating even the creation of the federal courts, punished revenue frauds. Direct interferences with federal justice (e.g. perjury in a federal court, bribery of a federal judge) were dealt with in the Act of April 3, 1790 'for the Punishment of Certain Crimes against the United States.' By 1825, federal law extended to arson of a federal vessel (but only if 'out of the jurisdiction of any particular State'), extortion by a federal officer, and theft by an employee from the Bank of the United States." Schwartz, **Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law and Contemp. Prob.** 64-65 (1948).

After the Civil War, the Congress began to employ federal sanctions to protect private individuals fr n invasion of their federal civil rights. Under these statutes — 14 Stat. 27 (1866) and 16 Stat. 140, 144 (1870) — a specific finding of the violation of a federal right was required. Also, "[t]he Post Office Code of 1872 afforded the protection of federal criminal law against moral corruption and financial depredation, **upon a showing that postal facilities had been used** to promote fraud or lotteries, or to disseminate obscenity." Schwartz, **supra, 13 Law and Contemp. Prob.** at 65. (Emphasis added.)

The concept that Congress could make a criminal offense out of the use of, or interference with, federal communications facilities and federally regulated commerce between the states was promoted by legislation in 1910 which created the offense of transporting a woman in interstate commerce for immoral purposes, and in 1919 of transporting a stolen motor vehicle in interstate commerce.

Each of these statutes required an allegation and a finding of direct involvement of the criminal activity with federal or interstate facilities, or of commerce between two states. The number of bases for federal jurisdiction over criminal activity continued to grow and the scope for federal intervention was considerably broadened.

> "The foregoing list illustrates congressional employment of the following jurisdictional bases for adding federal to state sanctions against undesirable conduct: (1) use of the mails; (2) use of means of interstate commerce; (3) 'affecting' commerce; (4) interstate transportation (a) of the victim, (b) of the proceeds, (c) of the criminal himself; (4) (sic) radio broadcasting; (5) status of the offender as a federal employee; (6) status of the offender as an employee of an interstate carrier; (7) use of facilities of national securities exchanges; (8) federal ownership or custody of the property; (9) ownership or custody of the property by institutions licensed by the federal government or under its protection. The list can, of course, be extended almost indefinitely with crimes resting on the tax, war, and other powers of Congress."

Schwartz, **supra, 13 Law and Contemp. Prob.** at 79.

Despite the ever-broadening scope for federal regulation of criminal activity, the courts never relaxed the requirement of an allegation of the federal basis for jurisdiction. At times, the focus on the federal element overshadowed the importance of the criminal act itself. "Courts find themselves talking nonsense like the oft-repeated declaration that the use of the mails is the 'gist' of the offense of mail fraud, when all that is meant is that **this federal jurisdictional element must, of course, be alleged and proved."** Schwartz, **supra, 13 Law and Contemp. Prob.** at 79. (Emphasis added.)

This is because the use of the mails to defraud, not the defrauding of the individual, is the offense against the United States. The offense:

> ". . . is composed of two constituent elements. They are a scheme devised or intended to be devised to defraud . . . and the use of the mails for the purpose of executing the scheme . . . In other words, to constitute the offense a scheme to defraud must be devised and thereafter a letter . . . must be placed in the mail for the purpose of executing the scheme or attempting to do so." **United States v. Crummer**, 151 F. 2d 958, 962 (10 Cir. 1945).

The recitation of the federal grounds for intervention is not a dispensable formality; allegation and proof of the grounds are an integral part of the offense. Current federal criminal statutes stipulate the

two constituent elements of the crime — the act itself and its offensiveness to the United States. Both elements appear in the very body of the statute.

The Hobbs, or Anti-Racketeering Act, 18 U.S.C. § 1951, like the statute here involved, prohibits certain extortionate activities. Prosecution under this statute, however, must allege and prove two principle elements:

(1) The act of robbery or extortion, or an attempt or conspiracy to rob or extort; and

(2) The causing of obstruction or delay, or an effect upon commerce. 18 U.S.C. § 1951 (a); 31 **Am. Jur.** 2d 915, **Extortion** § 22 (1967).

18 U.S.C. § 1951(b)(3) defines "commerce" as interstate, foreign and all other commerce over which the United States has jurisdiction. That proof of interference with a specific federal interest is a necessary element of the crime is emphasized in the following discussion of the original version of the Anti-Racketeering Act:

> "The Act has the commerce clause for its constitutional basis, yet, as has been pointed out, the activities of racketeers are primarily local. Therein lies an explanation for the breadth of the clause which seeks to bring within the scope of the Act racketeering 'in connection with or in relation to any act in any way or in any degree affecting' interstate or foreign commerce . . .
>
> "So far as prosecutions against racketeering

> activities are based on conduct which may be found to fall within the scope delimited by the pragmatic judgments which such terms imply, there seems no question but that the Act does not go beyond the bounds of federal power." **A Note on the Racketeering, Bank Robbery and "Kick-Back" Laws, 1 Law and Contemp. Prob.** 445 (1934).

It is clear that the commentator feared that the statute might exceed the bounds of federal power. Courts have since upheld the constitutionality of this statute on the grounds that federal jurisdiction over the crime of robbery or extortion rests on the interference with interstate commerce. **United States v. Greene,** 350 U.S. 415 (1956); **Hulahan v. United States,** 214 F.2d 441 (8th Cir. 1954).

Petitioner concedes that Congress **can** regulate certain extortionate loan activities. But the Extortionate Credit Transactions Act differs significantly from the Anti-Racketeering Act. The basis of federal jurisdiction is **not** written into the credit statute. There is no requirement that jurisdictional facts be found and none were found in the instant case. The statute therefore **is** too broad in this case. It sweeps within its reach acts which belong solely within the province of state regulation and over which the federal government has no power. On the face of the statute the government need not allege or prove federal jurisdictional facts which are a constituent element of every federal crime.

This statute on its face extends **beyond** "the entire constitutional range of interstate commerce"

into purely local affairs. Such an extension of federal intervention into activities which are **not** within the power of Congress to regulate or prohibit is unconstitutional. In this case the very language of the Extortionate Credit Transactions Act is broader than the constitutional power of Congress.

Congress, in enacting the legislation challenged here, omitted the jurisdictional basis of the conduct proscribed. Instead, it made a general declaration of policy that the legislation was necessary and proper in the regulation of commerce and laws relating to bankruptcy. Other federal crimes relating to bankruptcy and commerce state the basis of the federal interest in the conduct prohibited.

The other federal crimes connected with bankruptcy are 18 U.S.C. §§ 151-155. All, unlike the statute here, set forth the basis of federal jurisdiction in the criminal statute. Title II of the 1964 Civil Rights Act commanded that all persons should be entitled to the full and equal enjoyment of the goods and services of any place of "public accommodation" without discrimination or segregation. Section 201(b) of the Act defines a place of "public accommodation" as a place whose operation affects commerce or whose segregation is supported by state action. Sections 201(b)(2) and (c) place any "restaurant . . . principally engaged in selling food on its premises" under the restraints of the Act "if . . . it serves or offers to serve **interstate travellers** or a **substantial portion of the food which it serves . . . has moved in commerce.**" The Supreme Court decision in **Katzenbach v. McClung,** 379 U.S. 294 (1964), relied on a specific finding that a substantial portion

of the food served in the restaurant had moved in interstate commerce to uphold the constitutionality of the Act.

Though the bulk of the nation's economic activity is involved in, or itself affects, interstate commerce, there are also exceptions which are of purely local interest, aim and effect. That these are **not** susceptible of federal regulation has been specifically recognized in numerous decisions of the Supreme Court.

The Court defined these activities in **Gibbons v. Ogden,** 9 Wheat. 1 (1824), as those "which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government." In **United States v. Frankfort Distilleries,** 324 U.S. 293, 397 (1944), the Court said:

> "It is true that this Court has on occasion determined that local conduct could be insulated from the Anti-Trust laws on the basis of the purely local aims of the combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce."

The Court explained in **Mandeville Island Farms v. American Crystal Sugar Co.,** 334 U.S. 219 (1948), that the individual act at trial could be of a purely local nature and still restrain or affect interstate commerce, "except for those situations in which no aspect or substantial effect upon interstate commerce

can be found in the sum of the facts presented." (p. 234).

It is therefore necessary, in order to winnow out these activities, that the statute stipulate the relation to interstate commerce which the prohibited activity must bear, so that the substantial relationship be alleged and proved. Without such a stipulation, the statute is overbroad and unconstitutional because it also regulates that which it has no power to regulate.

The doctrine of overbreadth subjects a statute to attack on the basis that its sanctions may be applied to activity which is protected by the Constitution against regulation. The Tenth Amendment to the Constitution provides protection for the right of the states to maintain exclusive police power over their local affairs. The doctrine of overbreadth finds expression in two principle cases, **United States v. Robel,** 389 U.S. 258 (1967), and **Aptheker v. Secretary of State,** 378 U.S. 500 (1964), which, by analogy, are pertinent to the present case.

Both cases deal with penalties imposed upon members of the Communist Party. Congress in each case had a legitimate purpose, the protection of the national security against sabotage, espionage and other dangers of the world Communist movement. But in each case the net had been cast too broadly.

Robel and **Aptheker** involved legislation in which Congress sought to control various Communist Party activities by applying certain restrictions to all who held Communist Party membership. These restrictions applied to all members, regardless of whether

they actively participated in the Communist Party affairs or ever shared Communist Party views.

The Court held that the statutes involved were overly broad and infringed upon the freedom of association and freedom of movement protected by the First Amendment.

By analogy, the Extortionate Credit Transactions Act is likewise overly broad. It imposes punishment on a certain activity, regardless of whether that activity interferes with a federal interest. This infringement of the rights of the states protected by the Tenth Amendment violates the overbreadth doctrine and renders the Extortionate Credit Transactions Act unconstitutional.

This principle was upheld in **United States v. Metzdorf,** 252 F. 933 (Mont. 1918), in which the court examined a federal statute which prohibited threats against the President of the United States. The court ruled that this statute would be unconstitutional if read to prohibit threats against the President in his **personal** capacity, but added (252 F. at 936):

> "Any invasion of this personal security is an offense against the state only. Hence the United States has no power to prohibit and punish assault or murder threats against individuals generally within the states, but only in cases of the like in relation to its officers as such, and in relation to individuals as beneficiaries of some right or immunity created by or dependent on the federal Constitution."

The United States has likewise no power to punish the making of extortionate loans or the attempt to collect loans by **extortionate means generally within the states,** but only in cases which interfere with or affect interstate commerce or the bankruptcy laws. In all other cases, the extortionate activity is an offense against the state only. A federal statute which seeks to punish offenses against the states alone is overbroad and unconstitutional.

B. Even if the Statute were Somehow Construed to be Constitutional the Indictment was Fatally Defective for Failure to Allege a Jurisdictional Basis.

Even assuming, **arguendo,** that the Extortionate Credit Transactions Act were held to be constitutional (which petitioner submits would be error), the indictment itself was defective for failure to allege that defendant's conduct did affect commerce or the bankruptcy laws. In addition to being in the statute, at least one of these elements must be alleged in the indictment.

In **Metzdorf,** the federal statute prohibited any threat against the President of the United States. The judge stated in his opinion that, in order to find the statute constitutional, he would have to construe it to apply only to threats made against the President in his official capacity.

The indictment merely alleged that a threat was made against "the President of the United States." The judge ruled that this allegation was (252 F. at 937):

> ". . . open to the construction that the threat was against the President on account of his private character and capacity, and so does not charge an offense. Statutory language is not sufficient in cases where, as here, it may apply to innocent as well as to guilty acts. The indictment must add to the statutory words enough to directly and positively charge the offense denounced by the statute, so that, if all be proven, the defendant cannot be innocent . . . . In this respect the indictment is fatally defective."

So, too, in this case, the statutory language may apply to innocent as well as to guilty acts. The indictment lacked words sufficient to charge a federal offense, for unless interference with interstate commerce or bankruptcy was proven (and it was not), appellant is innocent of a federal crime and his verdict must be set aside.

VII. Petitioner's Conviction for Violations Under 18 U.S.C. Section 894 Amounted to an Enforcement of Ex Post Facto Legislation.

It is conceded that last extension of credit involved in the instant claim was made prior to the effective date of the Extortionate Credit Transactions Act. Petitioner, at the trial, requested an instruction to the jury that it must find that the date of the extension of credit was made at or subsequent to the effective date of the Act in order to find appellant guilty of the alleged charges. The district court denied this instruction and ruled that the date

of the extension of credit is not an essential element of the crimes charged under 18 U.S.C. § 894. Petitioner challenges this ruling since it amounts to the enforcement of **ex post facto** legislation.

The classic definition of an **ex post facto** law has been enunciated by the Supreme Court:

> "1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." **Calder v. Bull,** 3 Dall. (U.S.) 386, 389 (1798).

This definition has served as a guideline in innumerable cases. See **e.g., Bouie v. Columbia,** 378 U.S. 347, 353 (1963); **Beazell v. Ohio,** 269 U.S. 167, 169-170 (1925); **Malloy v. South Carolina,** 237 U.S. 180, 183-184 (1915).

Several courts have defined **ex post facto** legislation in terms of changing the legal definition or the ingredients of the offense:

> "The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to

> make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." **Beazell v. Ohio, supra,** 269 U.S. at 170 (1925).

Other decisions have stressed that an **ex post facto** law is one which, in relation to the offense and its consequences, alters the situation of a party to his disadvantage:

> "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." **Lindsey v. Washington,** 301 U.S. 397, 401 (1937).

More recently, Judge Moore, writing for a three-judge district court stated:

> "An ex post facto law is 'one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.' " **Keyishian v. Board of Regents of University of State of N. Y.,** 255 F. Supp. 981, 986-987 (W.D. N.Y. 1966).

An essential element of the offense charged in §

894, is unquestionably an extension of credit, which the statute itself has defined:

> "To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred." 18 U.S.C. § 891 (1).

Without proof of this substantive element, no crime has been committed.

The terms of the loans from DeBrizzi to Bove, Jr. and how repayment of the debts was deferred must be proved in order to prove the crimes. All the government has proved is that the last loan by DeBrizzi was made before the Extortionate Extension of Credit Act was enacted. For this reason, then, the statute, as applied to this case constitutes **ex post facto** law.

Furthermore, the alleged extension of credit by DeBrizzi to Bove, Jr. was alleged by the government at the trial as "extortionate." 18 U.S.C. § 891 (6) defines "extortionate extension of credit" as:

> "any extension of credit with respect to which it is the understanding of the creditor and the debtor **at the time it is made** that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." (Emphasis added.)

The crucial factor which makes the extension of credit extortionate, by definition in the statute itself, is the subjective understanding of DeBrizzi, and Bove, Jr. that at the time when the extension of credit was made, failure to repay could result in violence. To convict petitioner (who did not make the loan) on any one of the three counts, then, the government must prove the extortionate nature of the loans, which necessitates resort to DeBrizzi's activity and mental state prior to May 29, 1968.

Since the government must prove the alleged extensions of credit were "extortionate" at the time when they were made, or simply prove the making of the loans, their terms, and deferred repayment in order to convict, the government must prove conduct which was done before the statute was passed and which was innocent when done. Petitioner's conviction, then, constitutes a flagrant example of enforcement of **ex post facto** legislation. **Bouie v. Columbia, supra,** 378 U.S. at 899-900; **Calder v. Bull, supra,** 3 Dall. (U.S.) at 390.

Punishment of petitioner for violations of §894 constitutes **ex post facto** legislation for an additional reason. While the elements of the crime of collection of extensions of credit by extortionate means are set forth in section 894(a), section 894(c) provides novel rules of proof:

> ". . . in any prosecution under this section, if evidence has been introduced tending to show the existence, **at the time the extension of credit in question was made,** of the circumstances described in section 892(b)(1) or the circumstan-

> ces described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection." (Emphasis added).

Section 894(c) provides the government with a method of proving another essential ingredient of the crime, extortionate means, defined in the statute as:

> ". . . any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. § 891(7).

Section 894(c), then, allows the government to prove an express or implicit threat of use of violence, and therefore, extortionate means, by reputation evidence of the appellant if "at the time the extension of credit in question was made" the loan was unenforceable through civil judicial processes or the annual rate of interest exceeded 45%, as outlined in section 892(b)(1) and (2). The crucial fact upon which such proof under section 894(c) and, by ref-

erence, sections 892(b)(1) and (2), is dependent is, again, the time when the alleged extension of credit was made. In the instant case, the extension of credit by DeBrizzi to Bove, Jr. was made prior to the effective date of the statute.

The conviction herein involved was unconstitutional since it involved the enforcement of **ex post facto** law.

CONCLUSION.

1. Each of the issues presented herein poses important questions of federal criminal law which should be decided by this Court.

2. All of the issues raised in said petition raise new and important constitutional questions the validity of which will effect prosecutions now being conducted in District Courts throughout the country.

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the case numbered and entitled in its docket No. 34376 "United States vs. Angelo DeStafano," and that the judgment of that court be reviewed by this Court, and

for such other relief as to this Court may seem proper.

Dated this day of September, 1970.

ANGELO DeSTAFANO
Petitioner

By HOWARD T. OWENS, JR., ESQ.
Attorney for Petitioner

OWENS & SCHINE
With him on the Petition

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

———:———

No. 845—September Term, 1969.
(Argued June 17, 1970 Decided July 22, 1970.)

Docket No. 34376

———:———

UNITED STATES OF AMERICA

Appellee,

—against—

ANGELO DESTAFANO,

Appellant.

———:———

Before:

ANDERSON and FEINBERG, *Circuit Judges,* and

MACMAHON, *District Judge.**

———:———

Appeal from judgment of conviction by the United States District Court for the District of Connecticut, Robert C. Zampano, J., of violation of 18 U.S.C. §894. Affirmed.

———:———

JOHN J. LUCKART, Bridgeport, Conn., *for Appellant.*

LESLIE BYELAS, Assistant United States Attorney (Stewart H. Jones, United States Attorney for the District of Connecticut, on the brief), *for Appellee.*

———:———

*Of the Southern District of New York, sitting by designation.

Feinberg, **Circuit Judge:**

Angelo DeStafano appeals from his conviction on three counts of violating 18 U.S.C. §894, the federal loansharking statute, after a jury trial before the United States District Court for the District of Connecticut, Robert C. Zampano, J. Appellant received concurrent three-year sentences on each count. Count One of the indictment charged appellant, together with one Thomas DeBrizzi (who became a fugitive prior to trial), with the use of extortionate means to collect an extension of credit; Count Two charged the use of extortionate means to punish the nonrepayment of the same debt; and Count Three charged appellant and DeBrizzi with conspiracy to use extortionate means to collect the debt and to punish its nonrepayment. We affirm the conviction.

I.

From the evidence before it, the jury would have been justified in finding the following facts. The victim of the alleged criminal acts was Anthony Bove, Sr., the owner and manager of a gas station in Stratford, Connecticut. Sometime during May or June 1968, Bove's son, Anthony Bove, Jr. borrowed $3,000 from DeBrizzi. The son apparently became unable to repay the loan, which bore an interest rate in excess of 100 per cent. He received a telephone call from appellant, who told him to "get down here [to DeBrizzi's] right away, with your father." The purpose of requiring the father's presence was to get him to guarantee his son's loan. Rather than appear, the son fled to Florida. There followed a series of

incidents in which appellant and DeBrizzi attempted to force Bove, Sr. to pay the loan himself or to turn over his son to the tender mercies of DeBrizzi.

In mid-September 1968, appellant came to the father's gas station and demand to know where Bove, Jr. was, stating that DeBrizzi was "hot" and that the loan had not been paid. Appellant repeatedly asked Bove, Sr. where his son was, and ominously also asked him for his daughter's address. A few days later, appellant reappeared at the gas station, accompanied by DeBrizzi himself. DeBrizzi told Bove, Sr. that he had to get the money up "or else," that "Your son's a pig . . . I'll tell you, if you give me your son, then you don't have to give me any money. I got to make an example." The conversation left Bove, Sr. shaken and he went home for the rest of the day.

The next time Bove, Sr. heard from appellant was by telephone; he was informed that if he brought his son home "they would forget the whole thing." This conciliatory attitude, if such it was, soon disappeared. A few days later, appellant called Bove, Sr. again, informing him that "DeBrizzi was getting hot and he had to have the money" and that Bove, Sr. would "have to start paying vig [penalty payments] on it." In the background, DeBrizzi could be heard shouting "tell the son-of-a-B to get the money up or else."

The last confrontation between Bove, Sr. and appellant took place toward the end of October when DeBrizzi and appellant appeared at the gas station. DeBrizzi, in appellant's presence, told Bove, Sr. that

he either had to get his son to return or Bove, Sr. would be killed so that his son would come home for the funeral. One of the gas station employees started to leave to call the police; DeBrizzi told Bove Sr. to "get that bum back here, because he is going to call the Stratford Police, . . . I'll be out on bond in five minutes. I'll come back here and make you both look like a sieve."

II.

Against the background of this conduct, appellant wisely does not argue insufficiency of the evidence. He makes his chief attack instead on the constitutionality of the statute under which he was convicted. 18 U.S.C. §894 provides:

> (a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or
>
> (2) to punish any person for the nonrepayment thereof,
>
> shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.
>
> (b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, col-

lected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

18 U.S.C. §891 defines extortionate means as "any means which involves the use of an express or implicit threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person."

Appellant first contends that a prohibition of "implicit" threats of violence or other criminal means is unconstitutionally vague, because it may include **"entirely innocent"**[1] acts or communications made threatening only by the belief of the victim that, because of the character or reputation of the lender,

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[1]Appellant's brief, p. 9 (emphasis is in original).

he is being threatened. According to appellant, the statute would then subject wholly innocent conduct or communication to possible criminal penalties, an impermissible result. The Government responds that the proscription of "implicit" threats is not vague at all and that Congress was simply incorporating into the statute well established law of extortion, citing **Carbo v. United States,** 314 F.2d 718, 740-41 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964), and **United States v. Palmiotti,** 254 F.2d 491, 495-96 (2d Cir. 1958). There is force to this argument, but for the reasons set forth below we do not feel that we have to resolve all aspects of the issue. All of the acts and words of appellant and DeBrizzi were, if not express threats, at the least, clearly made threatening by the circumstances or the manner in which they were uttered. None could be called "entirely innocent" acts or words in which the specter of a threat came only from the subjective belief of the victim.

On these facts we need not deal with the question of whether the statute also reaches "entirely innocent" conduct if the victim believes that a threat is being made. See **United States v. Raines,** 362 U.S. 17 (1960). It has been pointed out that the void-for-vagueness doctrine actually serves fundamental and perhaps infrequently expressed "judicially felt needs and pressures." Note, The Void-for-Vagueness Doctrine, 109 U. Pa. L. Rev. 67, 75 (1960). But even if we take into account those special considerations, this is not an appropriate case to allow appellant to assert the unconstitutionality of a statute when applied to hypothetical facts rather than to his own

case. Certainly, no first amendment right is substantially involved here. Compare **Dombrowski v. Pfister,** 380 U.S. 479 (1965); see **Raines, supra,** 362 U.S. at 22-23; Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).[2] In addition, we note that the statute punishes only the **knowing** use of extortionate means, and thus prohibits the making of an "implicit" threat only if, at a minimum, the actor knows that his words or act ought reasonably to be taken as a threat. The knowledge requirement may well in itself insulate this statute from attack on vagueness or overbreadth grounds, see **United States v. Curcio,** 310 F. Supp. 351 (D. Conn. 1970); at the least we think that it makes highly doubtful any attack on the face of the statute. We conclude, therefore, that whatever slight vitality the vagueness argument might have in another context, it cannot benefit appellant here.

III.

Appellant also presents other constitutional arguments. He challenges sections 894(b) and (c), which allow the Government to introduce evidence of the prior use of extortionate means by a defendant and, under certain conditions, evidence of a defendant's reputation as an extortionate lender, to prove the nature of an implicit threat. These provisions are attacked on a number of grounds; we need not deal with them, since no such evidence was introduced here.

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[2]We do not regard as weighty appellant's claim that §894 violates his freedom of speech.

Appellant next challenges the power of Congress under the commerce clause and bankruptcy clause of the Constitution to enact a statute of this type. The argument is foreclosed by **United States v. Perez,** slip op. 2655 (2d Cir. May 1, 1970), which sustained the statute under the commerce clause.

Appellant also contends that the extension of credit here—the loan to Bove, Jr.—took place before the effective date of the statute; therefore, the argument goes, appellant was convicted under an **ex post facto** law. There is a dispute over when the loan took place,[3] but in any event the contention is without merit. The making of the loan was not, in this sense, an element of the crime. Appellant was charged with using extortionate means to collect a loan already made. That portion of appellant's conduct clearly occurred after the effective date of the statute. Appellant had the notice necessary to conform his actions to the new requirement of the law.

Finally, appellant claims that the indictment was multiplicitous in charging him in Count One with "participating in the use of extortionate means . . . to collect an extension of credit" and in Count Three with conspiring to so participate, both in violation of 18 U.S.C. §894. The Government responds by citing **Callahan v. United States,** 364 U.S. 587 (1961), in which the Supreme Court by a 5-4 vote upheld a conviction on one count for obstructing commerce by extortion and on another count for conspiring to

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[3]Appellant points out that he requested, but was denied, a jury instruction which would have required the jury to find when the loan was made.

do so, both in violation of the Hobbs Act, 18 U.S.C. §1951.

Whether an indictment is actually multiplicitous and, if so, what the proper remedy for multiplicity is are difficult questions, as the opinions in **Callahan** and **United States v. Ketchum,** 320 F.2d 3 (2d Cir.), cert. denied, 375 U.S. 905 (1963), make clear. See also 8 Moore, Federal Practice ¶8.07[1] (1969);1 Federal Practice and Procedure §145 (1969). Both the majority and minority opinions in **Callahan** at least agree that the question is essentially one of statutory construction, and the reliance on legislative history in **Callahan** is one of the bases appellant offers to distinguish it. Unfortunately, the legislative history of the federal loansharking statute is modest at best, see **United States v. Perez, supra,** and unilluminating on this point. However, there is certainly nothing unusual about treating as distinct crimes a conspiracy and the substantive offense that is its object, as Mr. Justice Frankfurter pointed out for the majority in **Callahan,** 364 U.S. at 593. Moreover, even if Count One and Count Three were to be regarded as charging the same offense—and we regard that as unlikely—we do not believe that appellant would prevail. Where, as in this case, a defendant has received concurrent sentences of the same length on the two counts which are allegedly multiplicitous, we do not think that a new trial would be required, much less the dismissal

of the indictment on both counts, the relief appellant suggests.[4]

The other points raised by appellant are either without merit or were not raised in the trial court and will therefore not be considered by us. Judgment of conviction affirmed.

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[4]Compare **Milanovich v. United States,** 365 U.S. 551 (1961), which involved crimes held to be factually inconsistent for the same defendant (stealing currency and receiving the stolen currency).